PENTAMASTER SMART SOLUTION SDN BHD v. VELOCITY ELECTRICAL ENGINEERING SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[SUITS NO: WA-22C-107-12-2019 & WA-22C-5-01-2020]
28 SEPTEMBER 2020

CIVIL PROCEDURE: *Amendment – Pleadings – Amendment to re-amended writ and re-amended statement of claim – Application for – Writ and statement of claim amended twice – Materiality and effectiveness of proposed amendments – Whether proposed amendments made bona fide – Whether application attempt at delaying court proceedings – Whether application ought to be allowed – Whether application would cause prejudice if allowed – Rules of Court 2012, O. 20 rr. 3(1), 5(1) & 12(1)*

The plaintiff had appointed the defendant as the nominated subcontractor to carry out certain works for a construction project. According to the plaintiff, (i) the defendant's works were poor, defective and incomplete; and (ii) the defendant abandoned the site without terminating the subcontract and failed and/or refused to clear the debris at the site. This prompted the plaintiff to file a writ and statement of claim, at the Kuala Lumpur High Court, claiming against the defendant for (i) liquidated and ascertained damages for the delay in completing the project; and (ii) sums and damages following the defendant's breach of contract. The defendant, on the other hand, counterclaimed for general damages at the Kota Bharu High Court ('Suit No. 5') before it was transferred to the Kuala Lumpur High Court. The plaintiff's claim (later known as Suit No. 107) and Suit No. 5 were then transferred to the Construction Court. The writ and SOC in Suit No. 107 were amended twice on (i) 17 January 2020, by way of O. 20 r. 3(1) of the Rules of Court 2012 ('ROC'); and (ii) on 17 March 2020, by way of O. 20 r. 12(1) of the ROC. In the present application, the plaintiff sought to amend their re-amended writ and re-amended SOC, pursuant to O. 20 r. 5(1) of the ROC and/or under the inherent jurisdiction of the court. In support of its application, the plaintiff submitted that, *inter alia*, the application was made at the early stage of the proceedings as the matter had not been set down for trial and the parties had not exchanged any pre-trial documents or complied with any pre-trial directions. Objecting to the application, the defendant submitted that (i) the proposed amendments were not made *bona fide* as they were intended to rectify the plaintiff's claim upon materials obtained from the defendant; (ii) the plaintiff had shown tendency to amend their pleadings upon sighting new facts and/or particulars pleaded by the defendant; (iii) the application was a tactical manoeuvre and merely an attempt at delaying the court proceedings; and (iv) the defendant would suffer prejudice which could not be compensated with costs if the amendments were allowed.

Held (dismissing application with costs):

(1) The court may give leave to a party to amend his pleading at any stage of the proceedings provided that no injustice is caused to the parties. In dealing with an application to amend the pleadings, the court should consider the materiality and effectiveness of the amendment. It is a well-established practice not to allow an amendment where it appeared that such an amendment would be useless. The court should look at the probable consequences of the amendment. If the amendment would be ineffectual, then it ought not to be allowed to be made. (paras 17 & 18)

(2) The plaintiff's application was not *bona fide*. The proposed amendments would be of no use. Certain paragraphs in the proposed amendments in the plaintiff's re-amended SOC either added nothing to the plaintiff's case or were akin to the plea put forth by the defendant. Some facts which the plaintiff sought to introduce were also not new and were discoverable from the start of the plaintiff's case. The plaintiff, having failed to plead the same and upon sighting the defendant's pleading, had now decided to apply to amend the re-amended SOC, five and a half weeks after being served with the amended defence and counterclaim. (para 18)

(3) The plaintiff, having invoked O. 20 rr. 3(1) and 12(1) of the ROC to twice amend the SOC, appeared to be bent on having recourse to all rules available under the ROC to amend the SOC and, by doing so, was putting their case in a piecemeal manner. The directions for the filing of pre-trial documents for Suit No. 5 had been given since 3 February 2020. The pre-trial documents could not be finalised until pleadings in Case No. 12 had closed since, with the exception of the bundle of pleadings for each suit, the court had directed that only one set of pre-trial documents were to be prepared for both suits as they had been consolidated and would be tried together. In addition, trial dates had not been set for the suits owing to the same reason. Therein laid the injustice and prejudice to the defendant. Justice could not always be measured in terms of money and costs alone could not make prejudice caused more prosaic or palatable. (paras 22 & 23)

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal [2011] 5 CLJ 720 CA ***(refd)***

ASM Development Sdn Bhd v. Hijjas Kasturi Associates Sdn Bhd [2009] 3 CLJ 1 CA ***(refd)***

Bahamas International Trust Co Ltd v. Threadgold [1974] 1 WLR 1514 ***(refd)***

Bodco Engineering And Construction Sdn Bhd v. Tribunal For Housing Purchaser Claims & Ors [2018] 6 CLJ 36 CA ***(refd)***

Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2016] 4 CLJ 831 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin [2014] 1 CLJ 499 HC ***(refd)***
Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors [2010] 7 CLJ 931 CA ***(refd)***
Eshah Sa'at v. Meriam Sa'at & Ors [1975] 1 LNS 37 HC ***(refd)***
Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***
Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim [2015] 3 CLJ 1062 CA ***(refd)***
Kintown Contractor Sdn Bhd v. Tometa-Mira Concrete Sdn Bhd [2015] 1 LNS 859 HC ***(refd)***
Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd [2016] 4 CLJ 438 HC ***(refd)***
Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor [2003] 2 CLJ 585 HC ***(refd)***
Lim Nyuk Foh v. Jamili Muhiman [2010] 1 LNS 1623 HC ***(refd)***
Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***
National Coal Board v. Wm Neil & Son (St Helens) Ltd [1984] 1 All ER 555 ***(refd)***
NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1959] 1 LNS 73 HC ***(refd)***
Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(refd)***
Suhaili Ismail v. Syarikat Sribima Sdn Bhd [2015] 1 LNS 719 CA ***(refd)***
Wong Ah Hee & Anor v. Low Tuck Hoong [1994] 2 CLJ 313 HC ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 20 rr. 3(1), 5(1), (5), 12(1), O. 34

For the plaintiff - Ho Hui Ying; M/s YC Wong
For the defendant - Sharifah Alliana Idid; M/s YS Ling & Co

Reported by Najib Tamby

JUDGMENT

Aliza Sulaiman J:

[1] The plaintiff had, *vide* a notice of application ('NOA') filed on 7 July 2020 (encl. 18), applied to amend their re-amended writ and re-amended statement of claim ('SOC') both dated 17 March 2020 pursuant to O. 20 r. 5(1) of the Rules of Court 2012 ('ROC 2012') and/or under the inherent jurisdiction of the court.

[2] Having read the related affidavits and written submissions and having heard oral submissions by learned counsel representing the parties *via* remote hearing on 1 September 2020, I had dismissed the plaintiff's application with costs in the cause.

[3] I now give my full reasons for the decision.

Brief Facts

[4] The plaintiff was the nominated sub-contractor for the supply, delivery, installation, testing and commissioning of electrical and extra low voltage installation for the project known as "Cadangan Membina dan Menyiapkan Projek 'Alwaqf' Di Atas Lot PT775, Tanah Milik Perbadanan Menteri Besar Kelantan, Seksyen 67, Mukim Kota, Daerah Kota, Jajahan Kota Bharu, Kelantan Darul Naim Fasa 1 (Lot Komersil) – 99 Unit Lot Komersil 5 Tingkat Beserta 1 Tingkat Basemen Tempat Letak Kereta (TLK), Fasa 2 (1 Blok Pangsapuri Servis 13 Tingkat) – 443 Unit Suites, 24 Unit Suites 1 Bilik, 38 Unit Suites 2 Bilik, Fasa 3 (Kompleks Perniagaan) – 256 Unit Lot Kompleks Perniagaan 3 Tingkat Beserta 1 Tingkat Basemen Tempat Letak Kereta (TLK), Taman Atas Bumbung, Dewan Konvensyen, Cineplex, Food Village dan Musolla Beserta Pusat Riadhah dan Kolam Renang Atas Bumbung Serta Lain-lain Kemudahan" ('said project'). The main contractor for the said project is Cosmo Property Management Sdn Bhd.

[5] By a letter of nomination of sub-contractor dated 25 July 2015, the plaintiff appointed the defendant as the nominated sub-contractor for the said project at a contract sum of RM7,651,364.

[6] The plaintiff alleged that the defendant did not complete the works within the extended completion date of December 2018 and had abandoned the construction site without terminating the sub-contract on 31 May 2019. Apart from the issue of delay, the plaintiff also claimed that the works done by the defendant were incomplete, of poor workmanship and defective and that the defendant had failed and/or unreasonably refused to clear the debris found at the site.

[7] Hence, the plaintiff's claims against the defendant comprise of:

(i) the sum of RM1,365,000 being liquidated and ascertained damages ('LAD') for the defendant's delay in completing the said project calculated at RM15,000 per day for 91 days and continuing together with interest thereon;

(ii) the sum of RM1,500,000 plus such other additional and continuing costs to be assessed by the court for the defendant's breach of contract in failing to complete the works and rectify the defective works;

(iii) the sum of RM150,000 or any other sum as deemed fit and proper by the court for the defendant's breach of contract in failing to clear the debris;

(iv) an amount to be assessed by the court for the defendant's breach of contract in failing to complete the scope of works;

(v) general damages for breach of contract; and

(vi) costs.

[8] The defendant counterclaimed that it is entitled to be paid and/or compensated for the works that had been completed based on the principle of *quantum meruit* as the conduct of the parties shows that the contract period had been extended. The defendant thus claims for general damages to be assessed by the court, interest and costs.

[9] The plaintiff initially filed their writ in NCVC of the Kuala Lumpur High Court on 18 November 2019 whilst the SOC was filed on 10 December 2019. The NCVC then transferred the case to the construction court on 16 December 2019 on the basis that the claim involves a construction matter and became known as Civil Suit No. WA-22C-107-12/2019 ('Suit No. 107').

[10] As for Civil Suit No. WA-22C-5-01/2020 ('Suit No. 5'), the defendant had filed their claim at the High Court in Kota Bharu, Kelantan on 8 October 2019. That suit was subsequently transferred to the Kuala Lumpur High Court and registered in the NCVC on 28 December 2019. On 23 January 2020, the NCVC transferred that case as well to the construction court.

[11] The writ and SOC in Suit No. 107 were amended twice, on 17 January 2020 (by way of O. 20 r. 3(1) ROC 2012 which provides that "A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are deemed to be closed …") and 17 March 2020 (by way of O. 20 r. 12(1) ROC 2012 which provides that "notwithstanding the provisions of this order, any pleading in any cause or matter may, by written agreement of all parties, be amended before commencement of the trial.").

The Proposed Amendments

[12] The proposed amendments to the re-amended writ and re-amended SOC were enclosed to the NOA as encl. A and encl. B, respectively.

[13] The proposed amendments to the re-amended writ are basically to the prayers in the section on the endorsement of the claim. The proposed amendments to the relevant paragraphs in the re-amended SOC are shown below (strikethrough and underlined):

(i) para 3:

> A company known as Cosmo Property Management Sdn Bhd ("Cosmo") is *and was at all times material to this action the main* contractor in respect of a project known as …;

(ii) para 4:

> The plaintiff is *and was at all times material to this action* the nominated sub-contractor for supply, delivery, installation, testing and commissioning of electrical and extra low voltage installation for the project ...;

(iii) para 7:

> Pursuant to Clause 4 of the sub-contract, the defendant is to pay *to the plaintiff* liquidated and ascertained damages at the rate of RM15,000.00 per day in the event the work is not completed by the Completion Date, *or, if any extension of the Completion Date has been given, by such extended completion date*.;

(iv) subpara 7.1:

> *By an Engineer's Instruction dated 24 October 2016 to, inter alia, the plaintiff and the defendant, the mechanical and electrical consultant of the project, United Premier Consultants Sdn Bhd ("UPC") extended the Completion Date to December 2018 ("the Extended Completion Date").*;

(v) para 8:

> The defendant did not complete the work by the *Extended* Completion Date and abandoned the site without terminating the sub-contract on 31 May 2019.;

(vi) para 9:

> By a Certificate of Non-Completion dated 2 July 2019, ~~the mechanical and electrical consultant of the project, United Premier Consultants Sdn Bhd~~ UPC certified that the defendant's delay was 3 months, i.e. 91 days. The *plaintiff avers that the defendant's delay was actually more than 3 months, but accepts UPC's decision*. Accordingly, the plaintiff is entitled to claim against the defendant liquidated and ascertained damages in the sum of RM1,365,000.00 and continuing until completion of the project. …";

(vii) subpara 17.1:

> An order that the defendant do pay to the plaintiff the following sums:
>
> (a) the sum of RM1,365,000.00 being liquidated and ascertained damages for the defendant's delay in completing the project *or such sum determined by this Honorable Court being liquidated and ascertained damages ("the said sum")*;
>
> (b) interest on ~~RM1,365,000.00~~ *the said sum* at the rate of 5% per annum calculated from 2 ~~April~~ *July* 2019 until the date of judgment;
>
> (c) Interest on paragraphs (a) and (b) above at the rate of 5% per annum calculated from the date of judgment until full realization.

The Plaintiff's Submissions

[14] The plaintiff urged this court to allow the application in encl. 18 on the following grounds:

(i) Under O. 20 r. 5(1) ROC 2012, the court can grant leave to amend the pleadings at any stage of the proceedings and based on the decisions in *Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors* [2010] 7 CLJ 931; [2009] 3 MLJ 785 and *Suhaili Ismail v. Syarikat Sribima Sdn*

Bhd [2015] 1 LNS 719; [2015] 6 MLJ 556, the general principle is that leave to amend is readily given at any stage of the proceedings, however late, provided that no injustice is caused to the parties.

(ii) The plaintiff has satisfied the principles laid down in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 in that no injustice is caused to the parties by allowing the amendments, in particular:

(i) the application was *bona fide*. The proposed amendments are made based on the existing facts and consistent with the plaintiff's re-amended SOC which is already before this court. The proposed amendments are said to be necessary for the real issues in dispute in respect of the plaintiff's claim for LAD to be fully and finally determined by the court and are primarily to plead facts in relation to the extended completion date for the defendant to complete its works under the sub-contract which have already been pleaded in the amended defence and counterclaim, and amended reply to amended defence and amended defence to counterclaim (encl. 17);

(ii) any prejudice caused to the defendant can be compensated by costs. The proposed amendments pertaining to the extended completion date are within the defendant's knowledge as exemplified by the defence and counterclaim dated 6 January 2020 (encl. 8); amended defence and counterclaim dated 27 May 2020 (encl. 16); and defendant's affidavit in reply ('AIR') to the plaintiff's amendment application (encl. 21). The case of *Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor* [2003] 2 CLJ 585; [2003] 1 MLJ 409 was cited to support this ground; and

(iii) the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. Furthermore, it was argued that the proposed amendments will not alter or introduce any new cause of action. Legally, leave to amend can be granted even if the effect of the amendment were to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts. The plaintiff relied on O. 20 r. 5(5) ROC 2012 and the cases of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361; [1997] 1 MLJ 629; *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230; and *ASM Development Sdn Bhd v. Hijjas Kasturi Associates Sdn Bhd* [2009] 3 CLJ 1; [2011] 6 MLJ 228 for this proposition. In any event, the plaintiff claimed that the defendant has conceded in para. 10 of their AIR (encl. 21) that the proposed amendments will not add anything to the facts of this case.

(iii) There is no inordinate delay on the part of the plaintiff as the application was filed prior to the filing of pre-trial documents and before this action is set for trial. Ms HY Ho submitted that delay, if any, does not equal to prejudice and that the defendant will suffer no prejudice if this application is allowed by the court. However, citing the case of *Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal* [2011] 5 CLJ 720; [2009] 4 MLJ 833, the plaintiff would suffer great prejudice and injustice if the proposed amendments are disallowed.

The Defendant's Submissions

[15] For the defendant, Ms Sharifah Alliana Idid forcefully submitted that the requirements set out in both *Yamaha Motor Co Ltd* (*supra*) and *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1 have not been fulfilled due to the following reasons:

(a) The application and the proposed amendments therein were not made *bona fide* or in good faith as they are intended to rectify the plaintiff's claim upon material obtained from the defendant. The defendant highlighted that the plaintiff has shown a tendency to amend their pleading upon sighting new facts and/or particulars pleaded by the defendant, presumably to strengthen their case and/or to simply delay the proceedings.

(b) The application is a tactical manoeuvre and merely an attempt at delaying the court proceedings. Additionally, no reasonable explanation was given by the plaintiff for the delay and reliance was placed on the decision in *Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd* [2016] 4 CLJ 438.

(c) The defendant will suffer prejudice which cannot be compensated with costs if the amendments are allowed.

Findings And Pronouncement Of The Court

[16] The plaintiff's application is made pursuant to O. 20 r. 5(1) ROC 2012 which reads as follows:

> Amendment of writ or pleading with leave (O. 20 r. 5)
>
> 5. (1) Subject to Order 15, rules 6, 6A, 7, and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.

[17] By virtue of this rule, the court may give leave to a party to amend his pleading at any stage of the proceedings provided that no injustice is caused to the parties. In determining whether injustice would be caused to the parties, learned counsel in this case have correctly cited the principles as

laid down by the apex court in *Yamaha Motor* since the plaintiff's application in encl. 18 was made before the trial has commenced. This is to be contrasted with the facts in the case of *Hong Leong Finance Bhd* (*supra*) where the defendant filed the application to amend the defence and a counterclaim on the eve of the trial. The Federal Court held that when an application to amend a pleading is made at such a late stage, the principles in *Yamaha Motor* ought not to be the sole consideration. David Wong Dak Wah JCA (as he then was) had referred to the two aforesaid authorities in *Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party)* [2016] 4 CLJ 831 at p. 837 and summarised the principle in *Yamaha Motor* as "… that is as long as the amendment of the pleadings is *bona fide* and does not prejudice the opposing party, the application ought to be granted as the opposing party can be compensated with costs.".

[18] In the instant case, I had given due consideration to the NoA and proposed amendments, affidavits and written submissions filed as well as the oral submissions by learned counsel representing the parties. It is my finding that the plaintiff's application was not *bona fide* for the following reasons:

(i) In the case submitted by the defendant namely, *Ponnusamy & Anor v. Nathu Ram* [1959] 1 LNS 73, it was held that in dealing with an application to amend the pleadings, the court should consider the materiality and the effectiveness of the amendment. It is a well-established practice not to allow an amendment where it appeared that such an amendment would be useless. The court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. This well-known principle as enunciated by Good J in the Ipoh High Court was cited and approved by the Court of Appeal in *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121; [2004] 4 MLJ 398 (see too, the judgment of the Court of Appeal in *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25 and the decisions of the High Court in *Eshah Sa'at v. Meriam Sa'at & Ors* [1975] 1 LNS 37; [1975] 2 MLJ 97; *Wong Ah Hee & Anor v. Low Tuck Hoong* [1994] 2 CLJ 313; [1993] MLJU 183; *Lim Nyuk Foh v. Jamili Muhiman* [2010] 1 LNS 1623; [2010] MLJU 1628; *Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin* [2014] 1 CLJ 499; [2014] 1 MLJ 911 and *Kintown Contractor Sdn Bhd v. Tometa-Mira Concrete Sdn Bhd* [2015] 1 LNS 859; [2015] MLJU 794 where reference was made to *Ponnusamy*'s case). The Court of Appeal in *Khairy Jamaluddin v. Dato'Seri Anwar Ibrahim* [2015] 3 CLJ 1062 had also referred to *Ponnusamy* and *HSB Bank Malaysia* in addressing the submission for the defendant in the following excerpt from the judgment:

> [37] Finally, we will address learned counsel for the defendant's argument that the correct judicial approach is not to dismiss the application to amend but to allow it giving the

> defendant a chance to make the proposed amendments on the condition that the particulars that were said to be lacking are pleaded in the amended defence that is ultimately filed in respect of the application. We appreciate the general rule with regard to amendment, that is, the court should lean towards allowing amendments to be made to the pleadings to make them clear and to put before the court all the material facts on the issue or issues that require the court's determination. However the court's discretion to do so must be exercised judiciously. The court must be satisfied that the proposed amendments have passed all the legal requirements and are not prejudicial to the party against whom the amendments are to be made. In other words the court must also consider the materiality and effectiveness of the amendments - see *Ponnusamy & Anor v. Nathu Ram* [1959] 1 LNS 73; [1959] MLJ 228 and *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121; [2004] 4 MLJ 398 referred to by the learned High Court Judge in her written judgment. …".

It was finally held that there was a clear lack of *bona fide* in the pursuit of the proposed amendments by the defendant in that case.

(ii) Applying the said legal principle to the case before me, it is my considered view that the proposed amendments would be of no use because:

(a) the proposed amendments to paras. 3 and 4 of the re-amended SOC add nothing to the plaintiff's case since the defendant has, in para 2 of the amended defence and counterclaim admitted the fact that Cosmo Property Management Sdn Bhd is the main contractor and the plaintiff is the sub-contractor for the said project;

(b) the proposed amendments to para. 7 of the re-amended SOC is akin to the plea that was put forth by the defendant in para. 4 of its amended defence and counterclaim which, among others, reads "… defendan turut memplidkan bahawa, berdasarkan kl. 4, perjanjian subkontrak tersebut, sekiranya terdapat lanjutan kepada tarikh siap tersebut ("tarikh siap lanjut"), kiraan gantirugi jumlah tertentu adalah dikira dari tarikh siap lanjut tersebut.". The plaintiff then replied in para. 2 of encl. 17 that "plaintif menafikan perenggan 4 pembelaan terpinda defendan setakat mana ia menyatakan bahawa gantirugi jumlah tertentu yang dituntut oleh plaintif adalah tidak munasabah, tidak logik dan tidak sah di sisi undang-undang. Plaintif mempunyai hak untuk menuntut gantirugi jumlah tertentu tersebut daripada defendan berdasarkan kadar yang ditetapkan dalam sub-kontrak tersebut yang yang merupakan suatu pra anggaran gantirugi yang tulen berdasarkan jumlah gantirugi yang perlu

dibayar kepada pihak-pihak berkaitan dan kepentingan-kepentingan sah yang perlu dilindungi. Lebih-lebih lagi, kerugian sebenar yang ditanggung oleh plaintif disebabkan kelewatan defendan dalam menyiapkan kerja-kerjanya adalah lebih daripada gantirugi jumlah tertentu yang dituntut tersebut."

In this regard, I agree with the submission by the defendant's counsel that the fact which the plaintiff seeks to introduce *via* para 7 of the re-amended SOC is not new and is discoverable from the start of the plaintiff's case as it concerns a term of the sub-contract. However, the plaintiff failed to plead the same and upon sighting the defendant's pleading, has now decided to apply to amend the re-amended SOC, five and a half weeks after being served with the amended defence and counterclaim. What is more pertinent is that the pleading relates to a clause in the sub-contract, the meaning and interpretation of which involves a question of law which would have to be determined by the court (see the decisions of the Court of Appeal in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38 at pp. 44 - 45 citing the judgment of Lord Diplock in *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514; and in *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357 at pp. 363 and *Bodco Engineering And Construction Sdn Bhd v. Tribunal For Housing Purchaser Claims & Ors* [2018] 6 CLJ 36; [2017] 4 MLJ 501 at p 517 where reference was made to the case of *Royal Selangor Golf Club v. Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 1 CLJ 995; [1990] 2 MLJ 163; wherein the court cited the case of *National Coal Board v. Wm Neil & Son (St Helens) Ltd* [1984] 1 All ER 555). As acknowledged by the plaintiff, the facts in relation to the extended completion date for the defendant to complete the works under the sub-contract have been pleaded in the amended defence and counterclaim, and encl. 17. This would suffice for purposes of placing the issues in dispute in respect of the plaintiff's claim for LAD to be finally decided by the court.

(c) the proposed amendments to paras 7.1 and 8 of the re-amended SOC are a reflection of para. 5(c) in the defence and counterclaim which was filed on 6 January 2020, six months before the filing of encl. 18, and it states "pada 24 Oktober 2016, UPC telah mengisukan satu notis "engineer's instruction" dalam mana UPC memaklumkan bahawa tarikh penyiapan baru yang dicadangkan bagi unit-unit adalah Disember 2018;". In para 3.2 of encl. 17, the plaintiff countered that "Perenggan 5(c) pembelaan terpinda adalah dinafikan melainkan bahawa UPC telah mengeluarkan suatu "engineer's instruction" ("arahan tersebut") kepada plaintif pada 24 Oktober 2016. Arahan tersebut juga telah dihantar kepada

defendan. Menurut arahan tersebut, tarikh penyiapan telah dilanjutkan ke Disember 2018.". My finding in respect of this proposed amendment is similar to the proposed amendment as discussed in subpara (b) above in that the fact as to the completion date being extended *vide* the engineer's instruction dated 24 October 2016 has been adequately pleaded;

(d) by the proposed amendments to para. 9 of the re-amended SOC, the plaintiff seeks to include the statement that the defendant's delay was actually more than three months. Nevertheless, the plaintiff accepts UPC's decision in certifying the defendant's delay as 91 days and there is no change to the particulars of claim for LAD which remains at RM15,000 per day for 91 days; and

(e) by the proposed amendments to para. 17.1(a) and (b) of the re-amended SOC, the plaintiff wishes to expand on the prayer for LAD by adding that the order which is sought from the court is for the sum of RM1,365,000 or any other sum as determined by the court as LAD. It is noted that in para. 9, the plaintiff had pleaded their entitlement to claim LAD in the sum of RM1,365,000 "dan berterusan sehingga penyempurnaan projek tersebut" against the defendant. By the words as quoted, it is understood that the court may, if at the end of the trial the court finds that the plaintiff has proven their claim on a balance of probabilities, make an order for the payment of LAD by the defendant to the plaintiff, together with interest thereon, in an amount as supported by the evidence adduced at the trial.

[19] The plaintiff contended that the application is made at the early stage of the proceedings as the matter has not been set down for trial and the parties have not exchanged any pre-trial documents or complied with any pre-trial directions. In para. 12 of the affidavit in support, the plaintiff's director affirmed that the application was made as soon as the plaintiff had verified the facts regarding the extended completion date with their employees and obtained the relevant documents from Kota Bharu, Kelantan. In view of the movement control order ('MCO') imposed to curb the Covid19 pandemic, the said verifications could not be carried out earlier. The defendant however, argued that the plaintiff's reliance on the MCO as an excuse for the delay in filing encl. 18 is disingenuous and smacks plainly of a tactical manoeuvre. It was contended that the plaintiff is merely relying on particulars or facts introduced by the defendant to bolster the plaintiff's case and/or streamline the relevant facts to the detriment of the defendant.

[20] Whilst it is true that this case is still at the stage of case management and trial dates have not been set, during the case management *via* e-review conducted by the Deputy Registrar ('DR') on 3 February 2020, the DR had directed that pleadings in Suit No. 5 have closed and directions were given for the preparation and filing of the usual pre-trial documents. For Suit No. 12, the DR directed that pleadings will close 14 days from that date ie on 17 February 2020. At the case management on 28 February 2020, which was also held by way of e-review, the DR directed that pleadings in Suit No. 12 had closed, and directions were given for the preparation and filing of the pre-trial documents. The next case management date on 2 April 2020 had to be postponed due to the MCO.

[21] Learned counsel for the parties appeared for the first time before me for case management on 10 June 2020. The plaintiff's counsel informed that the plaintiff had amended the SOC in Suit No. 12 (presumably what was meant was the second amendment on 17 March 2020) and they received the amended defence and counterclaim on 29 May 2020. Therefore, the plaintiff had until 12 June 2020 to file the amended reply to the amended defence and defence to counterclaim. In other words, pleadings for Suit No. 12 have not closed. I directed the parties to attend mediation and set 8 July 2020 as the date for case management by remote hearing for the close of pleadings in Suit No. 12 and status update on mediation as well as the compliance with the pre-trial directions for Suit No. 5.

[22] On 8 July 2020, the court was informed that the plaintiff had filed encl. 18 in Suit No. 12. The plaintiff thus, having invoked O. 20, rr. 3(1) and 12(1) ROC 2012 to twice amend the SOC, appears to be bent on having recourse to all rules available under the ROC 2012 to amend the SOC and by doing so, is putting their case in a piecemeal manner. In comparison, directions for the filing of pre-trial documents for Suit No. 5, which is the defendant's claim against the plaintiff, have been given since 3 February 2020. The pre-trial documents cannot be finalised until pleadings in Case No. 12 have closed since, with the exception of the bundle of pleadings for each suit, the court had directed that only one set of pre-trial documents are to be prepared for both suits as they have been consolidated and will be tried together. In addition, trial dates have not been set for the suits owing to the same reason. In my view, therein lies the injustice and prejudice to the defendant.

[23] The plaintiff would naturally be quick to say that even if there is prejudice to the defendant, this can be compensated by costs. In this regard, I would associate myself with the views expressed by Lee Swee Seng J (as His Lordship then was) in paras. 37 to 40 at pp 451 - 452 in the case submitted by the defendant's counsel namely, *Klass Corporation* (*supra*). In essence, "justice cannot always be measured in terms of money" and "costs

alone cannot make prejudice caused more prosaic or palatable". The pre-trial case management under O. 34 ROC 2012 demands for timeous action and efficiency so that a case may progress to trial and disposed of as speedily as possible.

[24] The plaintiff's action in filing the application in encl. 18, which the court, having looked at the probable consequences of the proposed amendments to the re-amended SOC, is of the view that the proposed amendments would be ineffectual and of no value to the plaintiff's case, is lacking in *bona fide* and was therefore dismissed with cost.